

TANG AH LIK & ORS v. TAN AH BA

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COURT OF APPEAL, PUTRAJAYA

SUPANG LIAN JCA

LIM CHONG FONG JCA

AHMAD FAIRUZ ZAINOL ABIDIN J

[CIVIL APPEAL NO: P-02(NCvC)(W)-631-04-2023]

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6 NOVEMBER 2024

Abstract – *A trustee or an executor of a will is under a duty to distribute the estate to the beneficiaries in accordance with the wishes of the testator. An agreement, made subsequent to the making of the will, that purported to change the provisions of the will, must be proven to have been intended by the testator. Hence, the court ought to critically test all evidence, including oral evidence, and consider the whole circumstances of the case in deciding whether the subsequent agreement has superseded the will.*

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EVIDENCE: *Expert evidence – Signature – Will – Subsequent agreement transferring beneficial interest in properties to one of sons who was also executor of will – Whether documents forged – Evidence of attestation of agreement against evidence of handwriting expert – Whether signature in will starkly different from signature in agreement – Whether signature in will most cogent – Whether signatures could not have been from same person*

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SUCCESSION: *Will – Validity – Signature in will – Subsequent agreement transferring beneficial interest in properties to one of sons who was also executor of will – Whether documents forged – Whether signature in will starkly different from signature in agreement – Whether agreement contained explicit express provision transferring properties to executor – Whether agreement evidence of transfer of properties to executor – Whether absence of express provision in will that properties bequeathed to all sons meant that executor was sole beneficiary*

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This was an appeal on a sibling dispute pertaining to the transfer of properties by the father to a son contrary to intent in the will of the father that also benefitted the other sons. The parties were all sons of the late Tan Kim Khay ('TKK'), who owned four properties that were purchased from the late Ahmad Haji Ismail. According to the plaintiffs, TKK intimated orally to them that his assets would be distributed amongst all his sons equally as reflected in TKK's will executed on 13 May 2003 ('will'). TKK passed away in October 2005. There was, however, no distribution of the properties by the defendant who was the named executor in the will by reason that the subdivision of the properties was then still ongoing. However, after the subdivision was completed, the properties were never distributed to the

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- A plaintiffs on the reason that TTK had, subsequent to the making of the will, transferred the beneficial interest in the properties to the defendant *via* an agreement dated 28 June 2003 made between TTK and the defendant ('agreement'). Consequently, the administrators of the estate of the late Ahmad Haji Ismail, on 19 December 2005, transferred two lots of the
- B properties to the defendant whereas parts of the other two lots of the properties were later transferred to the defendant *via* a vesting order of the High Court. In 2014, the defendant sold and transferred two of the lots. Upon becoming aware of the existence of the agreement, the plaintiffs in 2013 and 2014, lodged police reports based on their claim that the agreement and
- C TTK's affidavit dated 16 March 2005 ('affidavit') made for the purpose of vesting the properties on the defendant were forgeries. Hence, the plaintiffs commenced legal action ('suit') claiming that the defendant committed equitable fraud by having transferred all the properties to himself in breach of his duty as trustee/executor under the probate action of TTK. The High Court Judge ('HCJ') dismissed the claim with costs ('judgment') and hence,
- D this appeal, which was in the main, on the genuineness of the agreement.

Held (allowing appeal; setting aside judgment of High Court):

Per Lim Chong Fong JCA delivering the judgment of the court:

- (1) The plaintiffs bore the legal burden of proof to establish the causes of
- E action relied on by them. The establishment or otherwise of the causes of action pivotally hinges on the issue of genuineness of the agreement. While it was the plaintiffs who contended the properties belonged to them pursuant to the will, the defendant, in defence, relied on the agreement because the will had been superseded by the agreement.
- F Hence, the onus of proof of the genuineness of the agreement rested on the defendant. However, the HCJ placed both the legal burden and evidential burden of proof of the genuineness of the agreement on the plaintiffs and had, in this regard, erred. (paras 24 & 25)
- (2) The HCJ's heavy reliance on the attestation of DW1 and DW2 to
- G TTK's signing the affidavit and agreement respectively, *per se*, was unsafe. DW2 was the lawyer who crafted the agreement and the affidavit as well. More pertinently, the defendant initially appointed DW2 as his solicitor and counsel to defend the suit. DW2 was thus an interested witness in breach of r. 28(a) of the Legal Profession (Practice and
- H Etiquette) Rules 1987. The HCJ ought to have been more circumspect and cautious in accepting the testimonies of DW1 and particularly DW2. (paras 28 & 29)
- (3) It was obvious that TTK's signature in the specimen signature relied by
- I the handwriting expert looked starkly different from the signature in the agreement and affidavit. TTK's signature in the will was most cogent

because the will was made about a month and a half before the making of the agreement. The undisputed photocopy of the will had been produced for purposes of the trial. Having examined and compared the respective signatures, TKK's signature in the undisputed will was found to be starkly different from TKK's signature in the agreement and affidavit. The signatory on the will and the agreement as well as affidavit could not have been from the same person. (paras 30, 32 & 33)

- (4) There was no explicit express provision that the defendant was the sole transferee of the properties because he had not been specifically named as the purchaser or transferee in the annexure to the agreement. There was also no explicit consideration provided in the agreement for the sum of RM49,963 allegedly paid by the defendant. The defendant was only obliged to make advances for the subdivision charges in respect of the properties to be eventually recovered from the purchaser or transferee of the properties. The agreement was thus not the evidence of the transfer of the properties solely to the defendant by TKK. The HCJ erred and was plainly wrong in finding the properties rightfully belonged to the defendant because it was not expressly stated in the will to be bequeathed to the plaintiffs. Such conclusion could only be drawn if the properties had been expressly bequeathed to the defendant solely to the exclusion of the plaintiffs in the will. There was no such provision. In the premises, the HCJ had committed several misdirections both in fact and law that warranted appellate intervention. (paras 34-36)

Case(s) referred to:

- Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 CA (*refd*)
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC (*refd*)
Ng Hoo Kui & Anor v. Wendy Tan Lee Pheng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC (*refd*)
Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd [1980] CLJU 52; [1980] 1 LNS 52 FC (*refd*)
Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] CLJU 1416; [2012] 1 LNS 1416 CA (*refd*)
PP v. Vasanta Amarasekera [2024] 2 CLJ 290 HC (*refd*)
Theow Say Kow v. Graceful Frontier Sdn Bhd & Ors [2020] CLJU 52; [2020] 1 LNS 52 CA (*refd*)
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] CLJU 119; [1979] 1 LNS 119 FC (*refd*)

Legislation referred to:

Evidence Act 1950, ss. 73(1), 101, 102, 103

Legal Profession (Practice and Etiquette) Rules 1987, r. 28(a)

For the appellants - Damien Chan, Eng Khin Hock, Ian Hannibal & Pook Hu San; M/s Stephen & Co

For the respondent - Ang Khoon Cheong & Hanis Nabila Rosli; M/s CP Ang & Company

A [Editor's note: Appeal from High Court, Penang; Civil Suit No: PA-22NCvC-102-04-2019 (overruled).]

Reported by S Barathi

JUDGMENT

B **Lim Chong Fong JCA:**

[1] This is an appeal on a sibling dispute pertaining to the transfer of properties by the father to a son contrary to intent in the will of the father that also benefitted the other sons.

C [2] The parties are all sons of the late Tan Kim Khay @ Tan Kim Kmay ("TKK").

[3] We heard this appeal on 5 August 2024 and thereafter adjourned our decision to deliberate on the arguments presented by the parties.

D [4] After having duly considered them, we hereinbelow unanimously give our decision with our supporting grounds thereto.

[5] For purposes here, we will address the parties as plaintiffs and defendant in the High Court.

Background

E [6] The late TKK owned four properties, to wit, Lot 3755, Lot 3756, a portion of Lot 3745 and a portion of Lot 3752 subdivided from master title Pegangan No. 45(1), Mukim 12, Daerah Seberang Perai Utara, Pulau Pinang ("properties") purchased from the late Ahmad bin Haji Ismail

F [7] According to the plaintiffs, TKK intimated orally to them that his assets would be distributed amongst all his sons equally and this is reflected in TKK's will executed on 13 May 2003 ("will"). The will is reproduced below:

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I, TAN KIM KHAY (IC No.270727-71-5315) of No. 2100
Pokek Machang, 13300 Tasek Gluger, Province Wellesley
hereby revoke all former Wills and testamentary dispositions
made by me and declare this to be my last Will and testament.

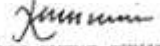
1. I appoint my son TAN AH BA (IC No.480902-09-5009) the
sole executor and trustee of this my will.

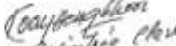
2. I direct my executor and trustee to pay my just debts
funeral and testamentary expenses.

3. I give devise and bequeath the rest and residue of
my property whatsoever and wheresoever situate unto my
children Tan Ah Lik @ Tan Teik Young, Tan Ah Ba,
Tan Ah Lek @ Tan Tiek Hoo, Tan Tek Leng, Tan Teik Liang
Tan Teik Chiang and Tan Poh Meng absolutely in equal shares.

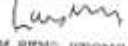
In Witness Whereof I have hereunto set my hand at
Penang this 13th day of May, 2003.

Signed and declared by the above-
named Tan Kim Khay as and for
his last will in the joint
presence of us present at the
same time who at his request in
his presence and in the presence
of each other have hereunto
subscribed our names as witnesses:


LIM CHENG CHUAN
Advocate & Solicitor,
PENANG.


LIM HENG YEONG
Advocate & Solicitor,
PENANG.

SALINAN YANG DISAHKAN


LIM HENG YEONG
Advocate & Solicitor,
Penang

22 AUG 2003
SALINAN YANG DISAHKAN

SN: GofHfPmaicUerpoNRUGLIXw

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JUDY KEMERAH DONA BY. DON BRYAN

A [8] TKK passed away in October 2005.

[9] There was, however, no distribution of the properties by the defendant who is the named executor in the will by reason that the subdivision of the properties was then still on-going according to him.

B [10] Furthermore, after the subdivision was completed, the properties were never distributed to the plaintiffs by reason that TKK had subsequent to the making of the will transferred the beneficial interest in the properties to the defendant *via* an agreement dated 28 June 2003 made between TKK and the defendant ("agreement"). The agreement is also reproduced below:

C [This space is intentionally left blank]

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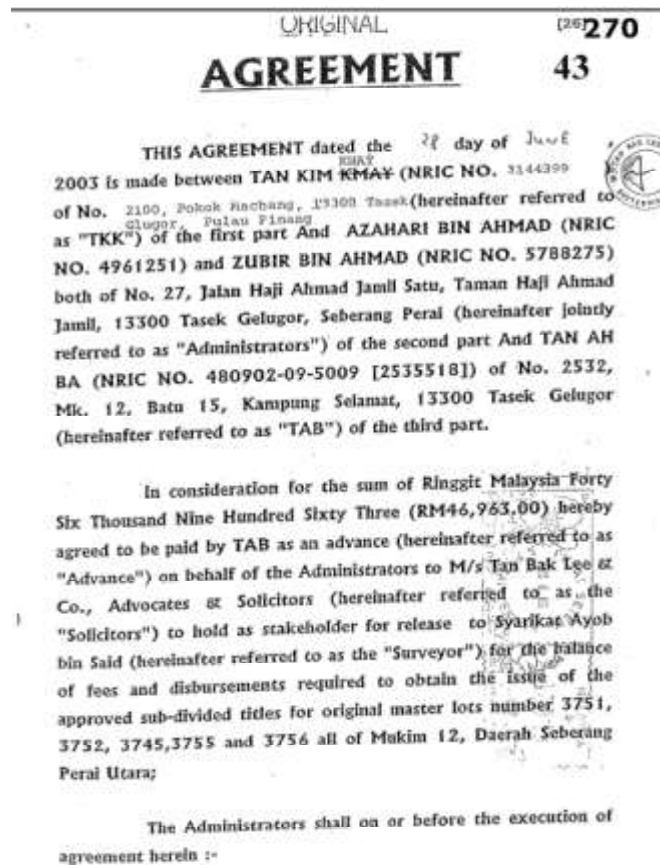
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- (1) execute all necessary transfer documents to effect transfer of all the said newly sub-divided lots to the respective purchasers/transferees of the Administrators as per lists annexed;
- (2) and to Irrevocably instruct the Surveyor to forward all the newly issued sub-divided titles to the Solicitors
- and
- (3) to obtain Hj. Abdullah bin Darus execution of withdrawal of his Caveats for all the other purchasers/transferees plots and deposit same with the Solicitors who are authorised to file the same in the land office when presenting transfer for the respective purchaser/transferees.

The Administrators whenever required shall execute all relevant documents prepared by the Solicitors for application of Court Order/Sanction to transfer the sub-divided titles to the respective purchasers/transferees.

The Solicitors is hereby authorised to release the Advance to the Surveyor upon execution of undertaking by the Surveyor to proceed to obtain the release of the sub-divided titles and to forward same to the Solicitors.

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All the transfer documents shall be deposited with the Solicitors. The Surveyor shall upon receipt of the Advance undertake to expeditiously obtain release of separate individual sub-divided titles per plan annexed and shall forward same to the Solicitors.

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The Administrators and TAB hereby instruct and authorise the Solicitors to collect from each of the purchasers/transferees their respective portion of their contributions (as per list annexed) towards payment for the Advance for the account of TAB. An agreed interests sum equivalent to 10% shall be added to each of the purchasers/transferees contributions for the payment received within the first year from the date of the agreement herein and additional of 10% for each subsequent years.

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All fees and disbursements for the Court Order/Sanction (if any) transfers including the Administrators portion shall be fully paid by the respective purchasers/transferees.

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And TTK hereby irrevocably instruct the Administrators to transfer all of TTK's beneficial interests to TAB.

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This Agreement shall be binding upon the respective heirs personal representatives successors in title and assigns of the parties herein.

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IN WITNESS WHEREOF the parties hereto ⁴⁶ve
hereunto set their hands the day and year abovewritten.

Signed by TAN KIM-KMAY
in the presence of :-

TAN BAK LEE
ADVOCATE & SOLICITOR

Signed by AZAHARI bin
AHMAD in the presence of :-

TAN BAK LEE
ADVOCATE & SOLICITOR

Signed by ZUBIR BIN AHMAD)
in the presence of :-

TAN BAK LEE
ADVOCATE & SOLICITOR

Signed by TAN AH BA
in the presence of :-

TAN BAK LEE
ADVOCATE & SOLICITOR

APPROVED BY THE REGISTRAR
of the High Court of Malaya
on 11/11/2005 (11/11/2005)

TAN KIM-KMAY

AZAHARI BIN AHMAD

ZUBIR BIN AHMAD

TAN AH BA

[11] Consequently, the administrators of the estate of the late Ahmad bin Haji Ismail on 19 December 2005 transferred Lot 3755 and 3756 of the properties to the defendant whereas the parts of Lot 3745 and Lot 3752 of the properties were later transferred to the defendant *via* a vesting order of the High Court.

[12] The defendant thereafter in 2014 sold and transferred Lot 3755 of the properties to Ng Boon Seng and Lot 3756 of the properties to Tong Chin Nam respectively. As for Lot 3756 of the properties, Tong Chin Nam thereafter sold and transferred it to Goh Siew Leng and Tay Chong Koon.

A [13] Upon becoming aware of the existence of the agreement, the plaintiffs in 2013 and 2014 lodged police reports based on their claim that the agreement and TKK's affidavit dated 16 March 2005 ("affidavit") made for the purpose of vesting the properties on the defendant is forgeries.

B [14] Hence, the plaintiffs on 15 April 2019 commenced legal action in the High Court ("suit") claiming that the defendant committed equitable fraud by having transferred all the properties to himself in breach of his duty as trustee/executor under the probate action of TKK.

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C **In The High Court**

[15] The plaintiffs claimed for the following in the suit in Bahasa Malaysia:

- D 21. Oleh yang demikian, Plaintiff-Plaintif memohon perintah-perintah seperti berikut:-
- E 21.1) suatu deklarasi bahawa perjanjian/ indentur yang dimasukkan antara Si Mati tersebut (TAN KIM KHAY @ TAN KIM KMAY), Defendan dan AZAHARI BIN AHMAD (No. K/P: 370496) dan ZUBIR BIN AHMAD bertarikh 28.6.2013 adalah batal dan tidak sah;
- F 21.2) suatu deklarasi bahawa Defendan telah cuai dan/atau gagal untuk melaksanakan tanggungjawab dan kewajipan sebagai wasi dan pemegang amanah bagi Plaintiff-Plaintif;
- G 21.3) suatu perintah bahawa Defendan dikehendaki membekalkan kepada Plaintiff-Plaintif akaun bagi menunjukkan jumlah hasil jualan dan/atau keuntungan yang diperolehi daripada penjualan Lot 3755 tersebut kepada NG BOON SENG (No. K/P: 701009-07-5351) dan Lot 3756 tersebut kepada GOH SIEW LENG (No. K/P: 660507-07-5508) dalam masa tujuh (7) hari dari tarikh Penghakiman/Perintah Mahkamah ini;
- H 21.4) nama Defendan sebagai wasi dan pemegang amanah harta pusaka dalam Geran Probet bertarikh 18.4.2006 dibatalkan, dikeluarkan dan digantikan dengan TAN TEK LENG (No. K/P: 570217-07-5017) dan TAN POH
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HENG (No. K/P: 621024-02-5221) sebagai pentadbir bersama baru bagi Harta Pusaka **TAN KIM KHAY @ TAN KIM KMAY**;

- 21.5) suatu deklarasi bahawa penjualan dan pindahtanah Lot 3755 tersebut kepada **NG BOON SENG (No. K/P: 701009-07-5351)** dan Lot 3756 tersebut kepada **GOH SIEW LENG (No. K/P: 660507-07-5508)** dan **TAY CHONG KOON (No. K/P: 631106-04-5495)** diisytiharkan terbatal dan tidak sah. Lot 3755 tersebut dan Lot 3756 dikembalikan kepada harta pusaka **TAN KIM KHAY @ TAN KIM KMAY** dan dibagikan/didaftarkan ke atas nama Plaintiff-Plaintif dan Defendan dalam bahagian sama rata ATAU secara alternatif Defendan membayar kepada Plaintiff-Plaintif kesemua hasil jualan Lot 3755 dan Lot 3756 dalam bahagian sama rata dalam masa tujuh (7) hari dari tarikh Penghakiman/Perintah Mahkamah ini;

- 21.6) suatu perintah bahawa kesemua 135808/665424 bahagian yang tidak dipecah-bahagi dalam suatu hartanah yang dipegang di bawah Geran No. 55224, Lot 3745, Mukim 12, Daerah Seberang Perai Utara, Pulau Pinang yang telah didaftarkan atas nama Defendan dipindahtanah kepada Plaintiff-Plaintif dan Defendan dalam bahagian sama rata dalam masa tujuh (7) hari dari tarikh Penghakiman/Perintah Mahkamah ini;

- 21.7) suatu perintah bahawa kesemua 239383/ 494816 bahagian yang tidak dipecah-bahagi dalam suatu hartanah yang dipegang di bawah Geran No. 55225, Lot 3752, Mukim 12, Daerah Seberang Perai Utara, Pulau Pinang yang telah didaftarkan atas nama Defendan dipindahtanah kepada Plaintiff-Plaintif dan Defendan dalam bahagian sama rata dalam masa tujuh (7) hari dari tarikh Penghakiman/Perintah Mahkamah ini;

- 21.8) bahawa Pendafuar, Pentadbir Hakmilik Tanah dan/atau mana-mana pihak berkuasa yang berkenaan hendaklah mengambil segala langkah atau tindakan yang perlu untuk melaksanakan dan menyempurnakan perkara seperti

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dinyatakan dalam Perenggan 21.6 dan 21.7 di atas dan/atau untuk memberi kesan kepada Penghakiman/ Perintah ini;

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21.9) Gantirugi Am atas kemungkinan amanah, Ganti rugi teladan ("*Exemplary Damages*") dan Ganti rugi kemudatan ("*Aggravated Damages*") ditaksirkan oleh Mahkamah Yang Mulia ini dan dibayar oleh Defendan kepada Plaintif-Plaintif dalam masa tujuh (7) hari dari tarikh Penghakiman/Perintah Mahkamah ini;

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21.10) Faedah pada kadar 5% setahun ke atas jumlah gantirugi yang ditaksirkan di dalam Perenggan 21.9 di atas dari tarikh Penghakiman sehingga penyelesaian penuh;

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21.11) Kos; dan

21.12) lain-lain perintah dan/atau relif yang Mahkamah yang mulia ini fikir adil, sesuai dan bermanfaat.

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Bertarikh pada 15 April 2019

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Peguamcara Plaintif

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Pernyataan Tuntutan ini difailkan oleh Tetuan Stephen & Co., Peguamcara bagi pihak Plaintif yang beralamat di No. 10 (2nd Floor), Lorong Teras Jaya 8, Kawasan Perniagaan Teras Jaya, 13400 Butterworth, Pulau Pinang. Tel: 04-3322234; Faks : 04-3200234
[Ruj Kami: S/L/18-563/TPH/e]

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[16] However, after trial, the learned judge dismissed the claim with costs (“judgment”). In the grounds of judgment (“GOJ”), the learned judge held as follows in support of the judgment in Bahasa Malaysia:

[8] PW1 menjalankan pemeriksaan ke atas perjanjian 2003 dan 5 spesimen lane tetapi tidak menganalisis tandatangan simati dalam wasiatnya yang bertarikh 13.5.2003 yang dibuat lebih kurang sebulan sebelum simati menandatangani Perjanjian 2003. Fakta bahawa tiada tandatangan seseorang boleh didapati serupa dari semua segi tidak boleh saya kira dipertikaikan. Dan kes-kes banyak diputuskan jika ada keterangan daripada seseorang yang boleh dipercayai melihat seseorang itu menandatangani sesuatu dokumen maka keterangan orang itu boleh diterima mengatasi keterangan pakar. Lihat *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19. DW1 dan DW2 telah disoal balas dan keterangan mereka tidak dicurigai. Plaintiff-plantif tidak dapat mengemukakan apa-apa keterangan yang boleh menyebabkan keterangan mereka terutamanya DW2 tidak boleh diterima.

[9] Wasiat simati dibuat lebih kurang dua tahun sebelum dia meninggal dunia. Dalam wasiat tersebut tidak menyenaraikan harta-harta. Perjanjian 2003 ditandatangani pada 28.6.2003 lebih kurang sebulan selepas simati menulis wasiatnya. Dalam Perjanjian 2003 simati memberikan keempat-empat lot tersebut kepada defendan. Dalam wasiatnya simati menyatakan wasinya iaitu defendant hendaklah menlangsaikan semua perbelanjaan pengkebumian dan hutang-hutangnya dan lebihan atau baki harta hendaklah dibahagikan sama rata kepada plaintiff-plaintif dan defendan yang merupakan anak-anaknya. Wasiat ini tidak disediakan oleh DW2 tetapi peguam lain. Pada pengamatan saya fakta bahawa simati tidak menyenaraikan keempat-empat lot di dalam wasiatnya menyokong fakta bahawa sememangnya simati berhasrat dan memberi keempat-empat lot tersebut kepada defendan. Simati merupakan pengarah syarikat dan bukannya orang yang tidak berpengetahuan. Tambahan lagi wasiatnya disediakan oleh seorang peguam.

[10] Kes plaintiff-plaintif berpaksikan Perjanjian 2003 yang dikatakan mengandungi tandatangan simati yang dipalsukan. Bagi saya beban terletak keatas plaintiff-plaintif untuk mengemukakan bukti bahawa Perjanjian 2003 tersebut palsu. Peliknya mereka tidak memanggil kedua-dua pentadbir pesaka Ahmad sebagai saksi sedangkan defendan telah memanggil DW2 dan defendan sendiri yang menandatangani Perjanjian 2003 itu. Plaintiff-plaintif bergantung kepada PW1 tetapi sebagaimana yang saya menyatakan sebelum ini saya tidak dapat menerima keterangannya atas alasan-alasan yang saya nyatakan. Oleh yang demikian, plaintiff-plaintif tidak berupaya menunjukkan kepalsuan Perjanjian 2003 tersebut.

[11] Selain itu plaintiff-plaintif gagal menamakan pemilik-pemilik Lot-Lot 3755 dan 3756 dalam tindakan ini. Mahkamah tidak boleh dalam apa keadaan pun memberi penghakiman kepada plaintiff-plaintif kerana pemilik-pemilik ini tidak diberi peluang untuk didengari. Mahkamah tidak boleh memberi apa-apa dekarasi atau perintah yang boleh menjejaskan hak dan kepentingan mereka tanpa mereka dijadikan pihak – *Kheng Chwee Lian (f) v. Wong Tak Thong* [1983] 2 CLJ 1.

- A [17] The plaintiffs are dissatisfied with the Judgment and have on 12 April 2023 lodged their appeal to the Court of Appeal.

Findings Of This Court

- B [18] The plaintiffs basically contended here that the learned judge made serious erroneous findings of fact and law in concluding that the agreement was executed by TKK on the totality of the evidence adduced below in the High Court.

- C [19] This is of course vehemently denied by the defendant who counter-contended that the findings and hence the judgment of the learned judge are impeccable.

- D [20] Our function here is that of review based on the record of appeal. Since this is an appeal after a trial, we are guided by the case of *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] CLJU 1416; [2012] 1 LNS 1416 where Abdul Wahab Patail JCA held as follows with emphasis added by us:

- E [4] Both parties began their submissions with the clear understanding that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts in the trial judge. They cited this court in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 CA; [1995] 3 MLJ 395 CA. This general principle was adopted by this court in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 and other cases. It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms “intervene” and “interfere” are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.
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- G [7] There is almost no limit to the range within which cases in court may vary. At one end there are cases that involve solely questions of law, and no facts are disputed. On the other there are cases that involve no law but all the facts are disputed. Within these cases there may be cases with disputed facts that involve solely interpretation and inferences leading to a conclusion on a finding on the disputed fact, and there may be other cases with disputed facts that involve solely oral evidence and the finding depends entirely upon an assessment of the credibility of witnesses who testified and were tested before the trial judge.
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- I [8] Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him, and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge, for example:

- (a) the judgment is based upon a wrong premise of fact or of law; A
- (b) *there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;*
- (c) *the trial judge has completely overlooked the inherent probabilities of the case;*
- (d) that the course or events affirmed by the trial judge could not have occurred; B
- (e) *the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or*
- (f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion; C

an appellate court will intervene to rectify that error so that injustice is not occasioned.

[21] Additionally, we noted that in the case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Pheng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, Zaleha Yusof FCJ held as follows with emphasis added by us: D

[71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in *Henderson (supra)* separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test: E

- (i) *a material error of law;*
- (ii) a critical finding of fact which has no basis in the evidence; F
- (iii) *demonstrable misunderstanding of relevant evidence; and*
- (iv) *a demonstrable failure to consider relevant evidence.*

(all of which justifies appellate intervention of a trial judge's decision), this court in *Gan Yook Chin (supra)* effectively included them under what amount to the trial judge as being "plainly wrong". G

[72] The phrase "lack of judicial appreciation of evidence" used in *Gan Yook Chin (supra)* could very well encompass three out of four errors of a trial judge (other than the "material error of law") said to be identifiable by Lord Reed in *Henderson (supra)*, namely: H

- (i) critical factual finding which has no basis in evidence;
- (ii) demonstrable misunderstanding of relevant evidence; and
- (iii) demonstrable failure to consider relevant evidence.

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- A [73] *Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of “material error of law” listed by Lord Reed in Henderson (supra) can occur when a trial judge erroneously apply legal principles (eg, rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on*
- B *a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by the trial judge in arriving at his conclusions (eg, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.*
- C [74] Thus, whilst there is a slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively shares a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.
- D [75] The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in *Damu Jadhao v. Paras Nath Singh* [1965] CLJU 30; [1965] 1 LNS 30; [1976] 1 MLJ 151, when it held:
- E The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] CLJU 202; [1964] 1 LNS 202; [1964] MLJ 92 and [1965] 2 MLJ 151 at 153 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:
- F Before the Court of Appeal in Singapore was entitled to reject the trial judge’s estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge’s view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.
- G This case seems to me to be completely dependent on the trial judge’s estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge’s view of the credibility of the witnesses before him was in any way plainly wrong.
- H [76] *What is pertinent is that, the “plainly wrong” test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.*
- I [77] It is to be observed that this court in *Tengku Dato’ Ibrahim Petra Tengku Indra Petra (supra)* had referred to *McGraddie (supra)* and *Henderson (supra)* and has adopted the *Henderson (supra)* approach of the “plainly wrong” test in determining whether the trial court’s findings of fact is reversible upon appeal:

Recently in *Henderson v. Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was “plainly wrong” in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

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[78] Hence following this court’s ruling in *Tengku Dato’ Ibrahim Petra Tengku Indra Petra (supra)* an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was “plainly wrong” where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

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[79] The outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made.

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[148] Given the aforesaid, *we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the “plainly wrong” test as espoused in decisions of this court should be retained as a flexible guide for appellate courts.* As long as the trial judge’s conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

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(emphasis added)

[22] The central issue here is the genuineness of the agreement.

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[23] Generally, the burden of proof is on the person proving the fact. This burden of proof involves the legal burden of proof which is set out in s. 101 of the Evidence Act 1950 as well as the evidential burden or onus of proof which is indirectly set out in ss. 102 and 103 of the Evidence Act 1950. In the former, it is the burden of establishing the case and rests throughout the trial on the party who asserts the affirmativeness of the case. As to the latter, it is the responsibility of adducing evidence to establish a relevant fact. This

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A onus of proof is not fixed but constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates; see *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418. In that case, it is worthwhile noting that Jeffery Tan FCJ held as follows with emphasis added by us:

B [60] It would pan out that the respondent, who was the plaintiff, had both the “burden of proof” to make out a *prima facie* case as well as the initial onus of proof to adduce evidence to prove the claim. The onus of proof would only shift to the appellants if the respondent had made out a *prima facie* case. That remained so even though forgery was pleaded. “Now, there is a great distinction between a civil and criminal case, where a question of forgery arises. In a civil case, the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine (emphasis added). The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of probabilities ...

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[24] In this case, the plaintiffs bear the legal burden of proof to establish the causes of action relied on by them. The establishment or otherwise of the causes of action pivotally hinge on the issue of genuineness of the agreement. It is the plaintiffs who contended the properties belong to them pursuant to the will but it is the defendant who in defence relied on the agreement because the will has been superseded by the agreement. Hence, it is plain to us that the onus of proof of the genuineness of the agreement rests on the defendant.

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[25] Nonetheless, the learned judge in para. [8] of the GOJ seems to have placed both the legal burden and evidential burden of proof of the genuineness of the agreement on the plaintiffs. In this regard, we are of the view that the learned judge erred by having wrongly placed the responsibility of proof on the plaintiffs pertaining to the genuineness of the agreement.

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[26] Be that as it may, and even if the onus of proof of the genuineness of the agreement is shifted to the plaintiffs after the defendant has sufficiently led evidence to demonstrate otherwise, we find the learned judge decisively found in favour of the defendant principally based on the testimony of DW2, the lawyer who attested to TKK’s signature on the agreement in preference over the expert testimony of PW1, a handwriting expert who found the signature of TKK in the agreement is a forged signature. PW1 in so concluding conducted a handwriting analysis comparing TKK’s signature in the agreement against five specimen TKK’s signature on an agreement in 1967, official receipts in 1989, a circular resolution in 2002 and a director’s statement on 15 August 2003. He did not, however, compare it against the will.

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[27] We find the learned judge simply relied on the proposition in the Court of Appeal case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 that if there is an attester to the signing of a document, then the evidence of the attester overrides the evidence of the expert witness. The learned judge reasoned that both DW1 and DW2 who attested to TKK's signing the affidavit and agreement respectively are not shaken in cross-examination and there is no other evidence that questions the acceptability of their testimony. Moreover, he alluded to PW1 not having analysed TKK's signature in the will.

[28] Upon our review, we, however, firstly find that the learned judge's relying heavily on the attestation of DW1 and DW2 to the agreement and affidavit *per se* is unsafe. It seems undisputed that DW2 is the lawyer who crafted the agreement and the affidavit as well. More pertinently, the learned judge overlooked the fact that the defendant initially appointed DW2 as his solicitor and counsel to defend the suit. DW2 is thus an interested witness in breach of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1987. This is evidenced by DW2's subsequent withdrawal from acting for the defendant on the eve of trial of the suit. We also noted that DW2 testified favourably on behalf of the defendant in the trial of the suit as follows with emphasis added:

Q: What do you have to say of this Civil Suit?

A: This is another attempt by the Plaintiffs to claim back Lot 3745, Lot 3752, Lot 3755 and Lot 3756 after the failure of their Civil Suit no. 254 and after all private caveats and registrar caveats be removed. *The Plaintiffs simply have no legal basis to challenge the Defendant's right and entitlement to Tan Kim Khay's interest in Lot 3745, Lot 3752, Lot 3755 and Lot 3756.* (emphasis added)

Furthermore, DW2 acted for the defendant as solicitor and the counsel in another lawsuit in 2012.

[29] In such circumstances, the learned judge ought to have been more circumspect and cautious in accepting the testimonies of DW1 and particularly DW2. It must be borne in mind the proposition in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* (*supra*) relied by the learned judge on the preference of the evidence of an attester over a handwriting expert presupposes that the attester is an uninterested person; see *Public Prosecutor v. Vasanta Amarasekera* [2024] 2 CLJ 290; [2024] 9 MLJ 931.

[30] Secondly and as a result, we have also reviewed the findings and conclusion of PW1 who is the expert witness appointed by the plaintiffs. We find PW1's conclusions in his expert report cogent having seen the comparison made by him between TKK's signature in the specimens and that in the agreement and affidavit. It is obvious to us even from our untrained

- A eye that TKK's signature in the specimen signature relied by the handwriting expert looks starkly different from the signature in the agreement and affidavit. The signature in the specimen looks generally similar. Additionally, the signature in both the agreement and affidavit looks almost identical.
- B [31] In such instance, it is instructive and gainful to refer to the case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119; [1976] 2 MLJ 229 where Chang Min Tat FJ held as follows with emphasis added by us:
- C *Nevertheless, the learned trial judge expressed himself to completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence.* For myself, I would with respect feel somewhat safe to refer to
- D and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writing. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case.*
- E [32] Thirdly, we are mindful that the learned judge also in para. [8] of the GOJ criticised the plaintiffs that TKK's signature in the will has not been examined by the handwriting expert. We are cognisant that TKK's signature in the will is most cogent because the will was made about a month and a half before the making of the agreement. But we believe the non-examination
- F of the original will by the handwriting expert is probably because the will was then deposited in court for purposes of probate.
- G [33] That notwithstanding, we noticed that the undisputed photocopy of the will has been produced for purposes of the trial of the suit. Thus, the learned judge had the opportunity to himself examine and compare TKK's signature in the will and the agreement and affidavit pursuant to s. 73(1) of the Evidence Act 1950; see *Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd* [1980] CLJU 52; [1980] 1 LNS 52; [1980] 2 MLJ 83. But regrettably, that was not undertaken by the learned judge. In the course of our review, we have therefore ourselves examined and compared the respective
- H signatures and we find that TKK's signature in the undisputed will is starkly different from TKK's signature in the agreement and affidavit. The signatory on the will and the agreement as well as affidavit could not have been from the same person.
- I [34] Fourthly and as strenuously submitted by the plaintiffs, we have also examined the contents of the agreement and we find there was no explicit express provision that the defendant is the sole transferee of the properties

because he has not been specifically named as the purchaser or transferee in the annexure to the agreement. There is also no explicit consideration provided in the agreement for the sum of RM49,963 allegedly paid by the defendant. In fact, the defendant was only obliged to make advances for the sub-division charges in respect of the properties to be eventually recovered from the purchaser or transferee of the properties. Put simply, the agreement is not the evidence of the transfer of the properties solely to the defendant by TKK.

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[35] Finally, and fifthly, the learned judge in para. [9] of the GOJ found that that the properties rightfully belonged to the defendant because the properties were not expressly stated in the will to be bequeathed to the plaintiffs. Upon our review, we have carefully construed the will and we find that the learned judge erred and is plainly wrong by reason that such conclusion can only be drawn if the properties have been expressly bequeathed to the defendant solely to the exclusion of the plaintiffs in the will. But there is no such provision therein.

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[36] In the premises, we find the learned judge has committed several misdirections both in fact and law that warrant appellate intervention by us. In short, the learned judge did not judicially appreciate the totality of the evidence adduced as well as failed to consider the probabilities of the case concerned. It is worthwhile to be reminded here the *dicta* of Mary Lim Thiam Suan JCA (later FCJ) in *Theow Say Kow v. Graceful Frontier Sdn Bhd & Ors* [2020] 1 LNS 52; [2020] CLJU 52 as follows with emphasis added by us:

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[257] We are aware of the firm and trite principles of appellate intervention particularly where there has been a full trial complete with oral testimonies and where the trial judge has determined the case(s) on the strength of such testimonies, preferring one witness over another because of how those testimonies have been given and received by the Court. But, there is always this caution: there are witnesses who testify well, confidently and consistently; there are many who do not; and both are supposedly on oath and giving truthful evidence.

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[258] Yet, quite unfortunately, that may not be so. Or, both may be truthful but the memory is faulty, the recollection patchy or, the comprehension of the events simply personal, incorrect or inaccurate. Worse, it may have been what transpired in these appeals, with witnesses testifying that they lied, almost without remorse or consequence, without a determination if the latest effort is in itself a lie.

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[259] At the end of the day, the trial judge is required to evaluate, dispassionately, all that evidence against any cold hard documentary evidence, the logical chronological development of events seen now through the lens of hindsight, to determine if that eloquent evidence bears up to its weight and may be accorded any cogency; whether the evidence is credible or inherently improbable, all tested against the applicable legal principles.

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A [260] Where the trial has taken such twists and turns and the length of time as have these cases before us, the task becomes a greater challenge; but one that needs nevertheless to be conducted. And, in these appeals, we have had to consider if the learned Judge's findings on fact have met those considerations.

B [261] *Having carefully and anxiously considered the records of appeal, the submissions and the grounds of judgment, we find that much of the evaluation and the conclusions drawn are not what a reasonable judge, similarly circumstanced would have decided, calling therefore for this Court's intervention. The test of 'inherent probability or improbability' as established by the Federal Court in Md Zainudin bin Raujan v. Public Prosecutor [2013] 4 CLJ 21; [2013] 3 MLJ 773 sums up the proper evaluation of evidence required of a trial judge; that discrepancies are bound to happen but what is important is to weigh any evidence against the totality of evidence, that it is not so much whether a witness was consistent or remained unshaken; rather, the "inherent probability or improbability of a fact in issue must be the prime consideration", and embellishments are sieved through and rejected without unwittingly throwing out the truth.*

D [262] Any audio-visual advantage that a trial judge may enjoy are not present in these appeals in the light of the numerous evidence to the contrary corroborated by relevant and contemporaneous documentary evidence which the learned Judge had plainly erred in not having taken such evidence into consideration. As pronounced by the Federal Court in *Tengku Dato Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641, an appellate court "should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of a trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached; and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge." While the learned Judge was perfectly entitled to weigh and evaluate the credibility of the witnesses, we have seen that that evaluation has been plainly erroneous.

(emphasis added)

G **Conclusion**

H [37] For the foregoing reasons, we unanimously allow the appeal and set aside the judgment. We accordingly enter judgment for the plaintiffs in terms of prayers 21.1 to 21.4 and 21.9 to 21.10 of the statement of claim. The assessment of damages pursuant to prayer 21.9 is remitted to the High Court for assessment. Since the relevant third parties are not before us, there is no order made in respect of prayers 21.5 to 21.8 of the statement of claim which the plaintiffs may and are given liberty to pursue by way of a separate action.

I [38] The defendant shall pay the plaintiffs costs of RM45,000 here and below subject to allocatur.
